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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/693,474

10/24/2003

Jadwiga Malgorzata Bialek

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EXAMINER

PADEN, CAROLYN A

ART UNIT

PAPER NUMBER

1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
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3 MONTHS

01/31/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

**Application No.**

10/693,474

**Applicant(s)**

BIALEK ET AL.

**Examiner**

Carolyn A. Paden

**Art Unit**

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 28 November 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3,7-11,13,14,16-18 and 20-25 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3,7-11,13,14,16-18 and 20-25 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- ☐ Notice of Informal Patent Application
- ☐ Other: \_\_\_\_\_

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on November 28, 2006 has been entered.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 3, 7-11, 13-4, 16-18, 20-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hercules Inc (EP 0757895) in view of Fischer as further evidenced by Lowe and also Schwartzberg.

Hercules discloses low fat salad dressing made to contain a pectin derivative as a partial or complete fat substitute. The dressing formulation is shown at the example bridging columns 6 and 7, starting at line 37. In this case the pectin component is regarded as the fiber source. Casein and whey protein are selected proteins for the composition. The oil

sources for use in the product are shown at column 5, lines 44-46. Up to 35% fat is disclosed for use at column 5, line 9. The pH of the emulsion is shown at column 2, line 58. The use of egg white is contemplated at column 5, line 17. Claim 1 appears to differ from Hercules in the recitation of the use of an insoluble fiber in the emulsion, in the recitation of the use of a viscosity building emulsifier. Fischer teaches the use of fruit fibers in foods. Herbacel AQ plus is disclosed as a source of pectin and fruit fiber. It is disclosed as useful in applications that include products where viscosity enhancement or thickening is acceptable. With the references of Hercules and Fischer before him, it would have been obvious to one of ordinary skill in the art to select Fischer's Herbacel as a pectin source for Hercules in order to provide a salad dressing with an enhanced viscosity. It is appreciated that the protein in Hercules is not described as being "viscosity-building" but no unobvious or unexpected result is seen from this feature because both whey and casein are defined as viscosity building emulsifiers in the specification. Further Lowe is relied upon to teach that casein is a well-known emulsifier for foods. Similarly egg white is also used as an emulsifier in foods. Applicant argues that Lowe teaches that casein is used in water in oil emulsions and not for the oil in water emulsion of the

claims. This argument has been considered but is not persuasive. First Lowe teaches that casein is useful for both of these types of emulsions and that egg white is also useful in creating oil in water emulsions. The dressing of Hercules is a low fat dressing so one of ordinary skill in the art would expect it to be an oil in water emulsion. It is appreciated that HLB is not mentioned but an HLB of greater than about 8 is known in the art as defining an oil in water emulsifier. So the emulsifier would be an expected to have the HLB value of the claims. It is also appreciated that the oil droplet size of the composition is not mentioned but no unobvious or unexpected results are seen from these features, particularly when a stable emulsion is formed. It is also appreciated that the settings from the homogenizer are not mentioned but to use one type of colloid mill over another would have been an obvious matter of choice with regard to the particular homogenizing apparatus that is available.

Claims 1, 3, 7-11, 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Watanabe as further evidenced by Lowe and Schwartzberg.

Watanabe discloses a low calorie foodstuff with dietary fibers. At examples 5 and 13 emulsions are formed with apple or wheat bran. Butter

oil is used in example 5. The emulsifier in example 5 is egg white and the emulsifier in example 13 is egg yolk. Although the HLB of these emulsifiers is not mentioned, the specification, at page 6, suggests that egg yolk is the preferred emulsifier. Thus one of ordinary skill in the art would expect that the preferred emulsifier would have the HLB value required in the claims. In example 13, a dressing is prepared with vinegar, cottonseed oil, water and wheat bran fiber. The product is described as being "mayonnaise-like". In example 20, mayonnaise is made using konjak as a source of fiber. At column 9, lines 51-67 all of the various dietary fibers are described. In this case vinegar is regarded as an acidulant. The claims appear to differ from Watanabe in the recitation of the oil droplet size and in the recitation of the manner in which the product is emulsified. In Watanabe the emulsions using dietary fibers were described as providing stable emulsions. It would have been obvious to one of ordinary skill in the art to homogenize an emulsion to the extent necessary to provide for a stable emulsion. No unobvious or unexpected result is seen from the use of the particular homogenizer conditions set forth in claim 12 or in the particular droplet size of claims 9 and 10. Although the particular viscosity of the claims is not mentioned, it is clear from Watanabe that foods of varying viscosities are

prepared. No unobvious or unexpected result is seen to flow from the particular viscosities set for in the claims. Although cheese and filling are not mentioned, no unobvious or unexpected result is seen from the application of the products as a filling in doughs. Also no unobvious or unexpected result is seen from the selection of one emulsifier over another.

Applicant has amended the claims to recite that the claimed emulsion is an oil-in-water emulsion. Although Watanabe does not mention the type of emulsion prepared in the example, it would have been obvious to expect the composition of example 5A to be an oil-in-water emulsion. The evidence for this assertion is that the water content of the product is much higher than the oil content in example 5A. Second, the product is formed with egg white, a known emulsifier for oil-in-water emulsions and Lowe, on page 271, is relied upon for evidence to support this assertion. The carbohydrate content of example 5A falls within the range of the claims. No unobvious or unexpected result is seen from the dissipation rate in the mouth and in the droplet size. Homogenization of foods is known to create products with low droplet sizes. No unobvious or unexpected result is seen from the homogenizer settings in claim 11 because the homogenizer of example 5A would have been expected to provide adequate

homogenization to prepare the emulsion of the claims. It is appreciated that HLB is not mentioned but an HLB of greater than about 8 is known in the art as defining an oil in water emulsifier.

Applicant argues the taste sensation of the product. No unobvious or unexpected result is seen from the taste sensation of the product.

Applicant argues the HLB value of the emulsifier but Schwartzberg shows that the HLB value would have been expected from the oil in water emulsion of the claims. So the emulsifier would be an expected to have the HLB value of the claims.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).




No claim is allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
CAROLYN PADEN 1-29-07  
PRIMARY EXAMINER 1761